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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WILLIAM R. LUMMIS, Temporary Administrator of the Estate of Howard R. Hughes, Deceased, *et al.*,
Petitioners

v.

LOS ANGELES AIRWAYS, INC.,
Respondent

Petition For Writ Of Certiorari To The Court of Civil Appeals, 14th Supreme Judicial District Of Houston, Texas

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QUESTIONS PRESENTED

1. Whether a valid final judgment by the court of a sister state between the identical parties involving the identical cause of action is entitled to full faith and credit in the state courts of Texas, if the prior judgment of the sister state is based upon the statute of limitations?

2. Whether the state of Texas is violating the constitutional rights of equal protection and due process of out-of-state defendants who are subject to the state's long-arm jurisdiction by simultaneously holding them subject to the state's tolling statute, thereby effectively denying them a statute of limitations defense merely because they are physically absent from the state, while at the same time resident defendants are allowed the benefit of such a defense?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the Texas state court proceedings were Plaintiff-Appellant Los Angeles Airways, Inc., Respondent herein, and Defendants-Appellees, William R. Lummis, Temporary Administrator of the Estate of Howard R. Hughes, Deceased, and John Does I through IV, Petitioners herein. The identity of the John Does, I through IV, has not been divulged by Respondent.

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v.

LOS ANGELES AIRWAYS, INC., *Respondent*

Petition For Writ Of Certiorari To The Court of Civil Appeals, 14th Supreme Judicial District Of Houston, Texas

Petitioner William R. Lummis respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Civil Appeals, 14th Supreme Judicial District of Houston, Texas.

OPINIONS BELOW

1. The opinion of the Court of Civil Appeals, 14th Supreme Judicial District of Houston, Texas is reported at 603 S.W.2d 246 (1980) and is annexed hereto as Appendix A.

2. The opinion and judgment of Probate Court, No. 2, Harris County, Texas, entered on October 10, 1979, is not reported and is annexed hereto as Appendix E.

3. The opinion of the Eighth Judicial District of the State of Nevada in and for the County of Clark, entered on June 5, 1978, is unreported. The opinion and judgment are annexed hereto as Appendix F.

JURISDICTION

1. The judgment sought to be reviewed is that of the Court of Civil Appeals, 14th Supreme Judicial District of Houston, Texas which was made and entered on June 18, 1980, and a copy thereof is annexed to this petition at Appendix B. Petitioner timely filed a motion for rehearing in that Court which was overruled on July 16, 1980. (See Appendix C.)

2. Petitioner timely sought review of the Court of Civil Appeals judgment by Application for Writ of Error in the Supreme Court of Texas, which was denied on October 15, 1980. (See Appendix D.) Petitioner's timely motion for a rehearing was overruled by the Supreme Court of Texas on December 17, 1980. (See Appendix D.) This petition for certiorari was filed within 90 days of that date.

3. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 and Rule 17 of the Rules of this Court.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

1. Article Four of the Constitution of the United States provides in Section 1 as follows:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

2. The Fourteenth Amendment to the Constitution of the United States in Section 1 provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. Texas Revised Civil Statutes Annotated, article 5537 provides: "If any person against whom there shall be cause of action shall be *without the limits of this State* at the time of the accruing of such action, or at any time during which the same might have been maintained, the person entitled to such action shall be at liberty to bring the same against such person after his return to the State and the time of such person's absence shall not be accounted or taken as a part of the time limited by any provision of this title." (Emphasis added.)

4. The text of the following rules is reproduced in Appendix G:

> Rule 41(b), Federal Rules of Civil Procedure.
> Rule 41(b), Nevada Rules of Civil Procedure.

Rule 106, Texas Rules of Civil Procedure.
Rule 108, Texas Rules of Civil Procedure.
Rule 109, Texas Rules of Civil Procedure.

STATEMENT OF THE CASE

Consideration of this case involves no disputed issues of fact; instead review by this Court is sought solely on questions of federal law.

This lawsuit is the sixth in a series of suits filed to date by Respondent Los Angeles Airways, Inc. ("LAA") a California corporation, in connection with an alleged agreement made some time between August 15, 1968 and the Fall of 1970, supposedly made by Howard R. Hughes ("Hughes") through one of his companies or associates to purchase LAA.[1] This suit again claims damages in excess of fifty million dollars ($50,000,-

1. 1. The same cause of action was first filed on October 2, 1970 and dismissed on jurisdictional grounds by the United States District Court of the Central District of California on November 1, 1972;

2. The same cause of action in No. 1 above was again filed on May 8, 1972 and tried to conclusion on the merits in 1976 in the Superior Court for Los Angeles County, California, and judgment entered against LAA on the merits (Los Angeles Airways, Inc. vs. Hughes Tool Company, No. C36249);

3. The exact same case as the instant one was dismissed on the ground that it was barred by the statute of limitations by the Eighth Judicial District Court of Clark County, Nevada, on June 5, 1978 (Los Angeles Airways vs. Lummis, No. A169229); and

4. A writ of *coram vobis* has been completely heard in the state courts of California concerning any evidence discovered after the 1976 trial (No. 2 above) and those courts have ruled that the judgment stands (Los Angeles Airways v. Hughes Tool Company, Supreme Court of California, No. 54947).

5. In addition, LAA has pursued its claim in still another federal court case in California against one of the attorneys for Mr. Hughes (Los Angeles Airways v. Davis, CD Cal. 72-1070), and summary judgment was granted against LAA in that case on December 17, 1979. To date, five courts have found no facts to support LAA's claim.

000.00) growing out of a creditor's claim filed in Texas by LAA against the Estate of Howard R. Hughes, Deceased ("Estate"), which was rejected by Petitioner William R. Lummis ("Lummis"), Temporary Administrator of the Estate. After rejection of the same claim in Nevada by Lummis, LAA instituted a lawsuit against the Estate in Nevada alleging promissory estoppel, breach of contract, and fraud and deceit in connection with the alleged agreement to purchase LAA. The Nevada suit was instituted on May 31, 1977. The Nevada suit was dismissed on the ground that it was barred by the statute of limitations by the Eighth Judicial District Court of Clark County, Nevada on June 5, 1978. (See Appendix F.) The parties have stipulated, and Nevada law holds, that the Nevada judgment is a final one.

After losing in the Nevada court, LAA decided to pursue further an *identical* lawsuit which it filed on February 4, 1977 in Probate Court No. 2, Harris County, Texas. The Texas suit was filed despite the fact that *none* of the parties (Plaintiff or Defendant) was *ever* in Texas during the relevant period or at any time thereafter and *none* of the alleged transactions occurred there. LAA sought to compensate for this absence of contact with the state by alleging (but offering no evidence in support of its allegation) that Hughes was domiciled (though never physically present) in Texas during the relevant time period and thus a Texas court could properly assume jurisdiction over the cause of action. Lummis moved for summary judgment in the Probate Court on two grounds, both originally based on questions of federal Constitutional law.

In Defendant's First Amended Answer, Motion for Summary Judgment and Brief in Support of Motion for

Summary Judgment, Lummis raised the issue that the Nevada judgment (a certified copy of which was entered into the record), as a valid final judgment by a competent court of a sister state involving the exact same parties on the same issues, was entitled to *res judicata* effect based on the full faith and credit clause of Article IV of the Constitution of the United States. Indeed, with the exception of the unsupported allegation of Texas domicile in the Texas complaint, the complaints are virtually verbatim.

Lummis further maintained that LAA's suit was also barred by the applicable Texas statutes of limitations. LAA did not dispute the fact that the statutory time period for filing its suit had long since expired under either the two year statute of limitations or the four year statute of limitations. However, LAA claimed that under the interpretation given to the Texas tolling statute, art. 5537, in *Vaughn v. Deitz*, 430 S.W.2d 487 (Tex. 1968), so long as Hughes was physically absent from the state, the tolling statute was applicable and the action could be filed upon his return *even though he could have been served* with Texas process at any time prior to his return. (Hughes had died April 5, 1976 en route by plane to Houston, Texas.) In Defendant's Brief in Support of Motion for Summary Judgment and in oral arguments before the court, Lummis opposed LAA's argument on the grounds that if, as LAA *itself* alleged in its complaint, Hughes was present in the state for purposes of jurisdiction, then no legitimate state interest would be served by allowing LAA to invoke the tolling statute and require Lummis to defend against an action that had accrued outside the state almost seven years earlier. In particular, Lummis requested the court to re-examine *Vaughn v. Deitz* in light

of the recent decision, *Wright v. Keiser*, 568 P.2d 1262 (Okla. 1977), where the Oklahoma Supreme Court struck down a similar tolling statute on the grounds that treating an out-of-state defendant differently from a resident defendant when both were properly subject to jurisdiction pursuant to the long arm statutes of that state amounted to denial of equal protection in violation of the Fourteenth Amendment to the Constitution of the United States.

After reviewing the record and hearing oral arguments, the Probate Court agreed with these two constitutional issues and found there was no genuine issue as to any material fact and that Lummis was entitled to a summary judgment as a matter of law.

LAA appealed to the 14th Court of Civil Appeals in Houston, Texas. In the appeal, Lummis again presented the constitutional issues followed by the trial court (Appellee's Brief, Appellee's Motion for Rehearing). The appellate court, in reversing the judgment of the trial court, expressly ruled against Lummis on the full faith and credit issue and declined to give full faith and credit to the final Nevada judgment in the same case. The appellate court did not address the equal protection issue. Lummis subsequently appealed to the Texas Supreme Court, again raising both constitutional issues in his Application for Writ of Error, Response to Respondent's Reply to Application for Writ of Error, and Motion for Rehearing of Application for Writ of Error. However, the Texas Supreme Court declined to review the judgment of the appellate court. The case is presently being remanded to the Probate Court for trial, and LAA, for the sixth time in a row, stands to get yet another "bite at the apple."

ARGUMENT

I

The decision below conflicts with prior decisions of this Court in the application of Article IV, Section 1, and is contrary to the decisions of two Circuit Courts of Appeal regarding the *res judicata* effect to be given a foreign judgment based on a statute of limitations.

Article IV, Section 1 of the United States Constitution provides that "full faith and credit shall be given in each state to the . . . judicial proceedings of every other state." Under Article IV, Section 1, one state must accord full faith and credit to another state's judgment where (1) the proceeding involved the same parties and subject matter, (2) the judgment was rendered by a court of competent jurisdiction over the parties and the subject matter, and (3) the judgment was a final one. Until now, Texas has steadfastly recognized valid final judgments of sister states and properly accorded them full *res judicata* effect in its courts. *State of Washington v. Williams,* 584 S.W.2d 260 (Tex. 1979); *Commonwealth of Massachusetts v. Davis,* 168 S.W.2d 216 (Tex. 1942), *cert. denied,* 320 U.S. 210 (1943).

In this case, however, a Texas court has refused to recognize the judgment of a state court of Nevada, even though, as the record quite plainly shows, the Nevada judgment meets all three requirements for full faith and credit. This ruling by the Court of Civil Appeals is not only violative of the mandate of Article IV, Section 1, but also cannot be reconciled with Texas law.

Prior to this case, no Texas court had ever ruled on the specific question of whether a foreign judgment based on a statute of limitations is entitled under Article IV, Section 1 to *res judicata* effect by a Texas court. Texas courts had, however, ruled consistently on all relevant components of the issue. For example, (1) Texas courts have squarely and uniformly held that a summary judgment rendered by a Texas court based on a statute of limitations will have the same effect as any other final judgment and will be given *res judicata* effect by other Texas courts. *Marshall v. Mayfield,* 227 S.W. 1097 (Tex. Comm'n. App., 1921, judgmt. adopted); *Alley v. Bessemer Gas Engine Co.,* 228 S.W. 963 (Tex. Civ. App.—Amarillo 1921, writ dism'd). Texas courts have also properly held (2) that the judgment of a sister state is conclusive upon the courts of Texas to the same extent that it is conclusive in the state in which it was rendered. *Commonwealth of Massachusetts v. Davis, supra; Carter v. G & L Tool Co. of Utah, Inc.,* 428 S.W.2d 677 (Tex. Civ. App.—San Antonio 1968, no writ).

The parties have stipulated and the courts of Nevada "have consistently held that a judgment while on appeal is final for *res judicata* purposes." *United States v. United Airlines, Inc.,* 216 F.Supp. 709, 725 (D. Nev. 1962), citing *Rogers v. Hatch,* 8 Nev. 35 (1872); *Cain v. Williams,* 16 Nev. 426, 430 (1882). Under the law of Texas and Nevada then, the Nevada judgment granted in favor of Lummis was entitled to full faith and credit, and the trial court properly accorded it *res judicata* effect as mandated by Article IV, Section 1.

In reversing the judgment of the trial court, the Court of Civil Appeals stated: "Since a statute of limitations

is a matter of remedy and procedure, it is governed by the laws of the state in which the action is brought." *Los Angeles Airways v. Lummis, supra,* 603 S.W.2d at 248. This reasoning, however, is superficial. While this statement of the law may be true in cases where a court is deciding which law to apply, it is inappropriate here, because this case is *not* a choice of law case, but *is* a full faith and credit case. Similarly, all of the cases cited by the Court of Civil Appeals, *Hobbs v. Hajecate,* 374 S.W.2d 351 (Tex. Civ. App.—Austin 1964, writ ref'd); *St. Louis & S.F.R. Co. v. Sizemore,* 116 S.W. 403 (Tex. Civ. App. 1909, no writ), and *Ross v. Kansas City S.R. Co.,* 79 S.W. 626 (Tex. Civ. App. 1904, no writ), were original action cases and did not address a situation such as the one here, *i.e.,* where one party who has litigated a claim and lost in a sister state seeks to relitigate the same claim in another state.

Because a valid final judgment of a sister state has been entered, the question here cannot be merely "a matter of remedy and procedure," as the Court of Civil Appeals stated. If this reasoning is correct, then every state court (as the court below did here) would be entitled to look behind a sister state's judgment even though the judgment demonstrates on its face that it was rendered by a court of competent jurisdiction. This selective exercise of full faith and credit merely because a statute of limitations is involved is violative of the rule announced by this Court in *Milliken v. Meyer,* 311 U.S. 457 (1940) that

> the full faith and credit clause of the Constitution precludes any inquiry into the merits of a cause of action, the logic or consistency of the decision, or the validity of the legal principles on which the judgment is based. *Id.* at 462.

This Court has already provided the federal courts with effective means for dealing with the situation where a party belatedly seeks to reinstitute the same cause of action against the same individual merely by changing forums. Under R. 41(b), Fed. R. Civ. Proc., when a cause is dismissed with prejudice, the dismissal is an adjudication on the merits, thus barring a later suit. (See Appendix G.) Recent decisions in the Second and Sixth Circuits have held that Rule 41(b) is applicable to cases like this one, and stated that an earlier district court judgment based on one state's statute of limitations operated as a bar to a later suit in another district court involving a different state's statute of limitations, if the earlier order did not specify that the dismissal was without prejudice. *Cemer v. Marathon Oil Co.*, 583 F.2d 830 (6th Cir. 1978); *Sack v. Low*, 478 F.2d 360 (2nd Cir. 1973). See also *Bertha Bldg. Corp. v. National Theatres Corp.*, 248 F.2d 833 (2nd Cir. 1957), *cert. denied*, 356 U.S. 936 (1958); *Murphy v. A/S Sobral*, 187 F.Supp. 163 (S.D. N.Y. 1960).[2]

These decisions are grounded in sound policy considerations. They serve to prevent

> local courts from being cluttered with actions that could have been brought elsewhere but are now time-barred there—particularly actions by *out-of-state plaintiffs* who had a fair opportunity to sue in their own home state but delayed too long, as was the case here. (Emphasis added.) *Sack v. Low, supra* at 368.

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2. The Federal Rules of Civil Procedure are generally applicable in Nevada, and under R. 41(b) of the Nevada Rules of Civil Procedure, the Nevada judge had the option of specifying that the dismissal was without prejudice. He did not do so. (The text of N.R.C.P. 41(b) is reproduced in Appendix G.)

By contrast, no sound policy considerations are served by the ruling of the court below. Carving out an exception to the full faith and credit clause merely because a foreign judgment is based on a statute of limitations serves only to encourage parties, such as LAA here, to engage in multiplicitous and duplicative litigation. (See fn. 1, *supra.*) LAA's cause of action accrued *not* in Texas, but in Nevada where LAA's complaint itself recites Mr. Hughes was residing during the relevant time period. LAA chose this other forum and lost.

Lummis respectfully submits that no legitimate state interest is served by allowing an out-of-state plaintiff to revive a cause of action that has already been held to have expired in the state where it arose. Under this Court's decision in *Barber v. Barber,* 323 U.S. 77 (1944), the final Nevada judgment, duly authenticated, was *prima facie* evidence of its validity which LAA has failed to overcome. Under Article IV, Section 1, it would seem imperative that this Court review the Texas court of appeals' erroneous refusal to accord the Nevada judgment full faith and credit, and thereby resolve the conflict created by the decision of the court below and those of the Second and Sixth Circuits.

II

The decision below conflicts with the decision of another state's court of last resort in the application of the Fourteenth Amendment to tolling statutes, and this significant and recurring issue has not been, but should be, settled by this Court.

At present, the state courts of Texas, under *Vaughn v. Deitz,* 430 S.W.2d 487 (Tex. 1968) construe art.

5537, the state's tolling statute, to hold that the Texas statutes of limitations will be suspended during the time a defendant is *physically absent* from the state, *even though* the defendant is *at the same time* within the state for jurisdictional purposes and may be served with process under the Texas "long arm" statute. As stated above (Statement of the Case, p. 7), the state court of appeals did not, in its opinion, address Lummis's claim that the present interpretation given by the state courts to the tolling statute is violative of Fourteenth Amendment guarantees of equal protection and due process. Instead, the court below reversed and remanded the cause to the Probate Court for a determination of whether Mr. Hughes was domiciled in Texas during the relevant time period.

The issue of domicile, however, need not, and indeed should not, have to be litigated in this action. A more fundamental question must be answered first. Is it constitutionally permissible for a state to hold a defendant subject to service of process, and at the same time, deny him the protection of the statute of limitations? Further, is it constitutionally permissible for a state to apply the tolling statute to an out-of-state defendant while *at the same time* to exempt resident defendants from the tolling statute, when both classes of defendants are within the state for purposes of jurisdiction and service of process?

This federal question which the court below sought to avoid is not unique to Texas, but is a substantial and recurring one that has been the subject of decisions in other jurisdictions with conflicting results. For example, the Oklahoma Supreme Court has ruled that a similar statutory tolling provision is violative of Fourteenth Amendment equal protection rights, *Wright v. Keiser,*

568 P.2d 1262 (Okla. 1977); on the other hand, the New Jersey Supreme Court has rejected such a constitutional attack on its tolling statute provision. *Lemke v. Bailey*, 196 A.2d 523 (N.J. 1963). More recently the New Jersey Supreme Court extended the *Lemke v. Bailey* holding to apply to certain foreign corporate defendants in *Velmohos v. Maren Engineering Corp.*, 416 A.2d 372 (N.J. 1980), and in reliance on *Velmohos*, the Third Circuit has ruled in favor of the New Jersey statutory tolling provision in *Hopkins v. Kelsey-Hayes, Inc.*, and the companion case, *Cohn v. Searle & Co.*, 628 F.2d 801 (3rd Cir. 1980).[3]

Lummis respectfully submits that the instant case presents compelling reasons for reviewing these constitutional issues. The basic equal protection test as laid down by this Court requires "that a statutory classification bear some rational relationship to a legitimate state purpose." *Weber v. Aetna Cas. & Surety Co., Inc.*, 406 U.S. 164, 172 (1972). Texas courts have long held that the purpose of the tolling statute is to protect domestic creditors from "the inconvenience and loss they would be exposed to by the absence of debtors and consequent immunity of the latter from process and judgment." *Gibson v. Nadel*, 164 F.2d 970, 971 (5th Cir. 1947), citing *Love v. Doak*, 5 Tex. 343 (1849); *Snoddy v. Cage*, 5 Tex. 106 (1849); *Moore v. Hendrick*, 8 Tex. 253 (1852). When, as in this case, the plaintiff itself alleges that the defendant was "legally" present in Texas and therefore subject to service of process during the relevant time period, the plaintiff's rights were surely protected and the purpose of the tolling statute was fully served. This is particularly true, where,

3. All three of the 1980 New Jersey cases are currently pending review on this issue by this Court on petitions for certiorari. (Nos. 80-644; 80-629; 80-663.)

as here, the out of state plaintiff's allegation of the defendant's "legal presence," *i.e.*, domicile, is the sole ground for invoking the jurisdiction of the Texas courts.

To hold otherwise is to confer upon the plaintiff "an additional right not enjoyed by other litigants—that of waiting for a more convenient season to bring suit, . . ." *Vaughn v. Deitz, supra* at 493 (Pope, J., dissenting.) The unfairness of such an advantage is strikingly illustrated here. Mr. Hughes, whose testimony with regard to the transactions in question would be at least as crucial as that of any other witness, died in 1976 while LAA delayed in bringing its suit against him in Texas. Other critical figures in the transaction have either died or become unavailable. Now the administrator of the decedent's estate is being forced to defend this spurious claim without the witnesses and defenses that would have been available had the suit been timely filed.

This Court recently noted that limitations statutes "represent a pervasive legislative judgment . . . that 'the right to be free from stale claims in time comes to prevail over the right to prosecute them.'" *United States v. Kubrick,* 444 U.S. 111, 100 S.Ct. 352, 357 (1979), quoting from *Order of Railway Telegraphers v. Railway Express Agency,* 321 U.S. 342, 349, 64 S.Ct. 582, 586, 88 L.Ed. 788 (1944). Under the *Vaughn v. Deitz* holding, however, the plaintiff's right to prosecute a claim will exist in perpetuity over the defendant's right to be free from stale claims, where the defendant is physically absent from Texas. The *Vaughn v. Deitz* majority reasoned that this dichotomy of treatment between resident and non-resident defendants, even though both are similarly subject to service of process, was not arbitrary or irrational because of the possible difficulty a Texas plain-

tiff might have in serving out of state defendants. Lummis submits that such a rationale is inherently flawed because it fails to distinguish between the fundamental issue of whether a non-resident defendant is within the jurisdiction of the state and thus amenable to service of process and the separate and secondary issue of whether such a defendant may be difficult to serve. If Mr. Hughes were a Texas domiciliary as alleged, he was subject to the jurisdiction of Texas courts (*Milliken v. Meyer*, 311 U.S. 457 (1940)) and was amenable to service of process under R. 108, TEX. R. CIV. P. (*Miller v. Cowell*, 362 S.W.2d 345 (Tex. Civ. App.—Houston 1962, no writ)). If LAA encountered difficulties serving Mr. Hughes, under R. 108, additional substituted service of process was available under R. 106 and R. 109, TEX R. CIV. P. (See Appendix G.) Therefore, the Texas legislature has already addressed the question of difficulty of service of process independent of the tolling statute, and provided the remedy. LAA could have suspended the statute of limitations simply by filing its complaint timely and making a bona fide attempt to serve Mr. Hughes.

Admittedly, limitations statutes and tolling statutes are designed to achieve competing policy objectives. Nevertheless, a state can, and must, achieve a balance between the right of a plaintiff to sue and the right of a defendant to repose in a way that deprives neither party of the equal protection and due process of the law to which he is entitled. The overwhelming majority of the states have resolved the conflict without reaching the constitutional issues raised here by holding that the enactment of long-arm statutes effectively nullifies the applicability of a

tolling statute whenever a non-resident defendant is subject to long-arm jurisdiction.[4]

The court below however declined to adopt the majority rule and Lummis must seek relief in this Court in order to secure his constitutional right to equal protection and due process of law. No legitimate state purpose can be furthered by holding a defendant both "in" a state for purposes of being subject to the state's tolling statute and "in" the state for purposes of process and jurisdiction—*and yet* "out" of the state for purposes of the statute of limitations. No rational basis exists for distinguishing between resident and non-resident defendants when both are similarly subject to process and jurisdiction.

This case, and the three others currently pending before this Court, indicate that the federal question involved is a substantial and recurring one that this Court has not yet, but should now, resolve.

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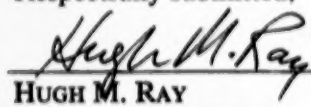
4. The district court, in *Cohn v. Searle & Co.*, 447 F.Supp. 903, 912 at n.21 (D. N.J. 1978), *rev'd*, 628 F.2d 801 (3rd Cir. 1980), noted that of the 42 states that have considered the question, 38 take the position that the tolling statute is nullified. *See also* 55 A.L.R.3d 1158 (1974).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the 14th Court of Civil Appeals, Houston, Texas.

Respectfully submitted,



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APPENDIX A

Opinion of the Court of Civil Appeals,
14th Supreme Judicial District
Houston, Texas

(Filed June 18, 1980)

COURT OF CIVIL APPEALS,
14th Supreme Judicial District
Houston, Texas

No. B2335

Los Angeles Airways, Inc.
Appellant

v.

William R. Lummis,
Temporary Co-Administrator,
Appellee

Timothy M. Thornton, Robert E. Hinerfeld, David Elson, Pamela S. Miller, Murphy, Thornton, Hinerfeld & Cahill, Los Angeles, Cal., Jack F. Ritter, Jr., Austin, for appellant.

Hugh M. Ray, Karen B. Pettigrew, Andrews, Kurth, Campbell & Jones, Robert H. Roch, Fisher, Roch & Gallagher, Houston, William M. Bitting, Hill, Farrer & Burrell, Los Angeles, Cal., for appellee.

Before COULSON, SALAZAR and JUNELL, JJ.

COULSON, Justice.

Los Angeles Airways, Inc. (LAA) appeals from a summary judgment granted in favor of William R. Lummis,

Temporary Co-Administrator of the Estate of Howard R. Hughes, Jr., Deceased (Lummis). Suit was filed by LAA on February 4, 1977, after its creditor's claim had been rejected. The suit alleged promissory estoppel, breach of an oral contract with partial performance and fraud and deceit in connection with an alleged agreement made sometime between August 15, 1968 and the fall of 1970 by Hughes, through his associates, to purchase Los Angeles Airways, Inc.

LAA's claims, or variations thereof, have been litigated on several occasions. A final judgment was entered against LAA in Nevada on June 5, 1978 on the ground that the Nevada statute of limitations had run on LAA's claim.

LAA's sole point of error urges that the summary judgment granted in favor of Lummis below was erroneous.

Lummis's motion for summary judgment was predicated on two theories. First that the prior Nevada judgment was entitled to *res judicata* effect and full faith and credit in the courts of the State of Texas as a matter of law. Second that LAA's cause of action was barred by the Texas statutes of limitation, TEX. REV. CIV. STAT. ANN. arts. 5526[1] and 5529 (Vernon 1958), because Hughes was legally present in Texas and amenable to service of process prior to the expiration of the statutes of limitation.

Lummis's only summary judgment proof was an exemplified copy of the complaint and decree in the Nevada case.

---

1. Subsequently amended: TEX. REV. CIV. STAT. ANN. art. 5526 (Vernon Supp. 1980).

The judgment of the court below does not state on which of Lummis's two theories the summary judgment was granted. We will, therefore, determine if the summary judgment was proper under either theory.

Lummis contends that the Texas courts must give *res judicata* effect to the Nevada summary judgment granted in favor of Lummis on the basis that the Nevada statute of limitations had run before the action was instituted. It is well settled that "the statutes of limitation are a part of the remedy, and not of the law affecting the rights." *St. Louis & S.F.R. Co. v. Sizemore,* 116 S.W. 403, 409 (Tex. Civ. App. 1909, no writ) quoting *Ross v. Kansas City S.R. Co.,* 79 S.W. 626 (Tex. Civ. App. 1904, no writ). Since a statute of limitations question is a matter of remedy and procedure, it is governed by the law of the state in which the action is brought. *Hobbs v. Hajecate,* 374 S.W.2d 351 (Tex. Civ. App.—Austin 1964, writ ref'd). Texas will look to its own statute of limitations, and the Nevada summary judgment based on limitations had no *res judicata* effect on a Texas court. The summary judgment granted below was not proper if based on Lummis's *res judicata* theory.

LAA, in its Brief in Opposition to Motion for Summary Judgment, urged that the Texas tolling statute, TEX. REV. CIV. STAT. ANN. art 5537 (Vernon 1958) prevented the statute of limitations from running against Hughes while he was absent from the state. This contention is based on LAA's claim that Hughes was a Texas domiciliary at all times pertinent to the litigation. If Hughes were a Texas domiciliary at all times pertinent to the litigation, article 5537 would operate to toll the statute of limitations under the holding in *Stone v.*

Phillips, 142 Tex. 216, 176 S.W.2d 932 (1944) which states:

> . . . if he is actually in the State or is domiciled here at the time the obligation arises, the running of limitation is suspended during his subsequent absence, even though he is not actually in the State at the date when the cause of action becomes a present, enforceable demand in the sense that the obligation has matured for suit. 176 S.W.2d at 934.

The interposing of a suspension statute by the nonmovant requires the party seeking a summary judgment based on the expiration of the statute of limitations to negate the applicability of the tolling statute in order to conclusively establish the limitation defense. *Zale Corporation v. Rosenbaum*, 520 S.W.2d 889 (Tex. 1975). As stated above, Lummis's only summary judgment proof was a copy of the complaint and decree in the Nevada case. In that complaint LAA alleged "[t]hat at all times during the period between August 1, 1968, and approximately November 28, 1970, Hughes was *residing* in the Penthouse suite of the Desert Inn Hotel in Las Vegas, Nevada." (emphasis ours). Lummis contends that LAA's allegation in the Nevada complaint precludes it from asserting that Hughes was a Texas domiciliary and thus claiming the benefits of the Texas tolling statute. An allegation of Hughes's Nevada *residence* does not negate the possibility of his being a Texas *domiciliary*. As stated in *Stone*, the fact that one resides elsewhere does not destroy one's Texas domicile so long as there was an intention to retain that domicile. 176 S.W.2d at 933.

Lummis failed to offer any summary judgment proof which would conclusively negate the applicability of the

tolling statute. If such evidence exists, it may be offered at a future summary judgment proceeding.

We do not address the merits of the domicile question. We only hold that appellee did not come forward with any summary judgment proof to refute LAA's claim that the statute of limitations was tolled because Hughes was a Texas domiciliary throughout the period in question.

We reverse and remand this cause to the trial court inasmuch as a summary judgment could not properly have been granted on the *res judicata* issue and appellee did not supply proper summary judgment proof to conclusively establish that appellant's claims were barred by limitations.

Reversed and remanded.

/s/ EDWARD D. COULSON
Associate Justice

Judgment rendered, and Opinion filed June 18, 1980.

Panel consists of Associate Justices Coulson, Salazar and Junell.

APPENDIX B

Judgment of the Court of Civil Appeals,
14th Supreme Judicial District,
Houston, Texas

(Filed June 18, 1980)

COURT OF CIVIL APPEALS,
14th Supreme Judicial District,
Houston, Texas

No. B2335

Los Angeles Airways, Inc.

v.

William R. Lummis,
Temporary Co-Administrator

"This cause, being an appeal from the judgment rendered by the court below and entered on October 10, 1979, came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of this Court that there is error in the judgment, it is therefore considered, adjudged and ordered that the judgment of the court below be reversed and it is ordered that the cause be remanded to the court below for further proceedings in accordance with this Court's opinion. It is further ordered that the appellee, William R. Lummis, Temporary Co-Administrator of the Estate of Howard R. Hughes, Jr., deceased, pay all costs incurred by reason of this appeal. It is further ordered that this decision be certified below for observance."

APPENDIX C

Overruling of Motion for Rehearing
by Court of Civil Appeals,
14th Supreme Judicial District
Houston, Texas

(Dated July 16, 1980)

COURT OF CIVIL APPEALS
14th Supreme Judicial District
Civil Courts Building
Houston, Texas 77002

July 16, 1980

Hon. Robert E. Hinerfeld
Hon. David Elson
Hon. Pamela S. Miller
Hon. Timothy Thornton
Murphy, Thornton, Hinerfeld & Cahill
611 West Sixth Street, Suite 1610
Los Angeles, California 90017

Hon. Jack F. Ritter, Jr.
719 Brown Building
Austin, Texas 78701

Hon. Hugh M. Ray
Hon. Karen Pettigrew
Andrews, Kurth, Campbell & Jones
2500 Exxon Building
Houston, Texas 77002

Hon. Robert H. Roch
Fisher, Roch & Gallagher
2600 Two Houston Center
Fannin at McKinney
Houston, Texas 77002

Hon. William M. Bitting
Hill, Farrer & Burrell
445 South Figeroa Street
Los Angeles, California 90071

Re: B2335—Los Angeles Airways, Inc. v.
William R. Lummis, Temporary
Administrator, from Harris

Gentlemen:

Please be advised that on this date in the above cause the Court OVERRULED appellee's motion for rehearing.

Further, please be advised that application for writ of error, if any, must be submitted on or before Friday, August 15, 1980.

Respectfully,

/s/ THELMA MUELLER
Thelma Mueller, Clerk

TM:rbf

APPENDIX D

Texas Supreme Court Rulings

CLERK'S OFFICE - SUPREME COURT
Austin, Texas

October 15, 1980

Dear Sir:

You are hereby notified that the Application for Writ of Error in the case of No. B-9708, William R. Lummis, Temporary Co-Administrator v. Los Angeles Airways, Inc., was this day refused. No reversible error.

Very truly yours,

GARSON R. JACKSON, Clerk

* * *

CLERK'S OFFICE - SUPREME COURT
Austin, Texas

Dec. 17, 1980

Dear Sir:

You are hereby notified that the Motion for Rehearing in the case of LUMMIS v. LOS ANGELES AIRWAYS No. B-9708 was this day overruled.

Very truly yours,

GARSON R. JACKSON, Clerk

APPENDIX E

Judgment of the Probate Court,
Harris County

(Filed October 10, 1979)

IN PROBATE COURT NO. 2
of Harris County, Texas

NO. 139,362

LOS ANGELES AIRWAYS, INC.
Plaintiff

v.

WILLIAM R. LUMMIS,
Temporary Co-Administrator of the Estate
of Howard R. Hughes, Jr., Deceased, et al.

JUDGMENT

On the 9th day of February, 1979, came on to be heard the Motion for Summary Judgment filed herein by the Defendant, William R. Lummis, Temporary Co-Administrator of the Estate of Howard R. Hughes, Deceased, et al (hereinafter referred to as "Defendant"), wherein Los Angeles Airways, Inc. is Plaintiff, although originally incorrectly denominated as Los Angeles *Airlines,* Inc., (hereinafter referred to as "Plaintiff"), and it appeared to the Court that such Motion had been made in proper form and time, that proper service thereof had been made, and that all parties are properly before this Court, and the Court having considered the applicable law; the record in this proceeding, including the relevant plead-

ings, motions, depositions, briefs, answers to interrogatories, admissions and affidavits on file at the time of the hearing, and the oral arguments of counsel; the Court is of the opinion that there is a complete absence of any genuine issue as to any material fact herein and that accordingly summary judgment should be rendered in favor of the Defendant, the Court therefore finds and concludes that there is no genuine issue as to any material fact, and Defendant is entitled to judgment as a matter of law; accordingly,

IT IS ORDERED, ADJUDGED AND DECREED:

(a) That Plaintiff Los Angeles Airways, Inc., a/k/a Los Angeles Airlines, Inc., take nothing by this suit against the Defendant, William R. Lummis, Temporary Co-Administrator of the Estate of Howard R. Hughes, Jr., Deceased, et al;

(b) That the costs accrued in connection with this action be and the same are hereby taxed against the Plaintiff, Los Angeles Airways, Inc.; and

(c) That this Order be and it is hereby made a final Order of this Court for the purpose of appeal.

/s/ PAT GREGORY
Presiding Judge

SIGNED AND ENTERED this 10th day of October, 1979.

APPENDIX F

Opinion of Nevada District Court

(Filed June 5, 1978)

IN THE EIGHTH JUDICIAL DISTRICT COURT
of the State of Nevada in and for
the County of Clark

Case No. A-169229

Dept. No. VI

LOS ANGELES AIRWAYS, INC.,
a California corporation,
Plaintiff,

v.

THE ESTATE OF HOWARD R. HUGHES;
WILLIAM LUMMIS and FIRST NATIONAL
BANK OF NEVADA,
Co-Special Administrators of the Estate of
Howard R. Rughes, Deceased; and Does I-IV,
Defendants.

DECISION AND ORDER

The above entitled matter came on regularly for hearing to consider defendants' motion for summary judgment. The motion is based on the grounds that the statutory limitation period had lapsed before the plaintiff filed its complaint.

Defendants allege, and plaintiff does not disagree, that plaintiff's cause of action had accrued by September 30,

1970. The instant action was not filed, however until May 31, 1977. Plaintiff's claim for relief is based primarily upon an alleged breach of an oral contract, which limitation period is four years. NRS 11.190(2)(c). In addition, plaintiff alleges a claim of fraud which has a three year limitation period after the aggrieved party has discovered all the facts constituting the fraud. NRS 11.190(3)(d).

Although the statutory limitation period had lapsed before plaintiff filed its complaint, nevertheless, plaintiff argues that pursuant to NRS 11.300 the limitation period was tolled during Howard Hughes' absence from Nevada. Consequently, if the limitation period was tolled, plaintiff's recovery is not barred by its delay in filing suit. Defendants, on the other hand, argue that the enactment of the long arm statute (NRS 14.065) in 1969 renders the operation of the tolling statute (NRS 11.300) inapplicable in the circumstances of the present case. This Court agrees.

The plaintiff's reliance on NRS 11.300 does not present a persuasive argument for denying defendants' motion for summary judgment—particularly in light of the recent decisions which have construed a long arm and tolling statute together. Those decisions hold that the enactment of a long arm statute has the practical effect of nullifying the applicability of the tolling statute whenever a non-resident or absent defendant is subject to long arm jurisdiction. *E.g., Moore v. Dunham,* 240 F.2d 198, 201 (10th Cir. 1957); *Bond v. Golden,* 273 F.2d 265 (10th Cir. 1959); *Smith v. Forty Million, Inc.,* 395 P.2d 201 (Wash. 1964); *Tarter v. Insco,* 550 P.2d 905 (Wyo. 1976); 55 A.L.R.3d 1158 (1974).

Plaintiff's reliance on NRS 11.300 is even more tenuous in light of a recent decision from the Oklahoma Supreme Court which declared a similar tolling statute unconstitutional. In *Wright v. Keiser*, 568 P.2d 1262 (Okla. 1977), the court held that the tolling statute was an unconstitutional denial of equal protection. The court reasoned that alleged tort-feasors who left the state were denied the protection of the statute of limitations while allowing tort-feasors remaining within the state the benefit of the limitation period. The court stated that there was no legitimate state interest in giving resident defendants preferential treatment over non-resident defendants when all defendants are similarly situated in terms of their susceptibility to the court's jurisdiction.

The Nevada cases are in accord with the foregoing authorities. *See Cal-Farm Insurance v. Oliver*, 375 P.2d 857, 78 Nev. 479 (1962); *Bank of Nevada v. Friedman*, 420 P.2d 1, 82 Nev. 417 (1966). Plaintiff, nonetheless, argues that the *Friedman* case stands for the proposition that summary judgment, based on the running of the statute of limitations, should be denied when an issue of fact is presented as to whether a defendant is continuously liable to service. The difficulty with such an argument, however, is that plaintiff cannot raise a fact issue as to whether Howard Hughes was amenable to service when they made no effort to effectuate service.

If serving Howard Hughes would have presented plaintiff with extreme difficulties, plaintiff could have preserved its tolling argument by simply filing the complaint. Unlike many states, Nevada follows the federal rule that an action is commenced when the complaint is filed, rather than when the defendant is served. NRCP 3. Therefore,

upon the filing of the complaint the statute of limitations is tolled. *Knight v. Witco Chemical Co.*, 517 P.2d 792, 89 Nev. 586 (1973); *Gatliff v. Little Audrey's Transportation Co.*, 317 F.Supp. 1117, 1119 (D. Neb. 1970). If plaintiff had tolled the limitation period through filing the complaint within the statutory period, it would have had at least a two year period to serve Howard Hughes. *Hassett v. St. Mary's Hosp. Assn.*, 478 P.2d 154, 86 Nev. 900 (1970). Therefore, any possible prejudice that plaintiff may have encountered by being unable to serve Howard Hughes would not have been any greater by filing before the expiration of the limitation period, as opposed to after.

Therefore, even under the plaintiff's version of the facts in regard to the service of process issue, defendants are entitled to judgment as a matter of law since plaintiff has not set forth a sufficient exception to the operation of the statute of limitations which would excuse its failure to file the complaint within the statutory limitation period.

Accordingly, it is

ORDERED that defendants' motion for summary judgment is granted.

DATED this 5th day of June, 1978.

/s/ HOWARD W. BABCOCK
District Judge

F-5

Judgment in the Eighth Judicial District Court of the State of Nevada in and for the County of Clark

(Filed June 13, 1978)

Case No. A-169229

Dept. No. VI

LOS ANGELES AIRWAYS, INC.,
A California corporation,
Plaintiff,

v.

THE ESTATE OF HOWARD R. HUGHES; WILLIAM LUMMIS and FIRST NATIONAL BANK OF NEVADA, Co-Special Administrators of the Estate of Howard R. Hughes, Deceased; and DOES I - IV.
Defendants.

The Motion of Defendants herein for summary judgment in the Defendants' favor dismissing the action on the ground that there is no genuine issue as to any material fact and that the Defendants are entitled to judgment as a matter of law, having regularly come on for hearing on October 27, 1977, before the Honorable Howard Babcock, Judge, Department VI of the above-entitled Court, Plaintiff being represented by their counsel RICHARD WEISBART, ESQ., and the Defendants being represented by their counsel, JOSEPH M. FOLEY, ESQ., of MORSE-FOLEY.

The Court on considering the pleadings, affidavits and memorandums of points and authorities filed herein; and

after hearing counsel for the respective parties, and due deliberation having been had, and the decision of the Court having been filed, and the Court having entered its Order granting the Defendants' Motion for Summary Judgment,

IT IS ADJUDGED AND DECREED that Defendants have judgment in their favor and against the Plaintiff dismissing this action.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that Defendants shall have their costs herein.

DATED this 9th day of June, 1978.

/s/ HOWARD W. BABCOCK
District Judge

APPENDIX G

PERTINENT RULES INVOLVED

1. Federal Rule of Civil Procedure 41(b) provides:

(b) *Involuntary Dismissal: Effect Thereof.* For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

2. Nevada Rule of Civil Procedure 41(b) provides:

(b) *Involuntary Dismissal: Effect Thereof.* For failure of the plaintiff to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted,

may move for a dismissal on the ground that upon the facts and the law the plaintiff has failed to prove a sufficient case for the court or jury. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

3. Texas Rules of Civil Procedure during the relevant period of this action provided:

Rule 106. Service of Citation

Unless it otherwise directs, the citation shall be served by the officer delivering to each defendant, in person, a true copy of the citation with the date of delivery endorsed thereon and with a copy of the petition attached thereto. Where it is impractical to secure personal service, as above directed, the court, upon motion, may authorize service by leaving a copy of the citation, with petition attached, at the usual place of business of the party to be served, or by delivering same to any one over sixteen years of age at the party's usual place of abode, by registered or certified mail, or in any other manner which will be reasonably effective to give the defendant notice of the suit.

Rule 108. Defendant Without State

Where the defendant is absent from the State, or is a nonresident of the State, the form of notice to such defendant of the institution of the suit shall be the same as prescribed for citation to a resident defendant; and such notice may be served by any disinterested person competent to make oath of the fact in the same manner as provided in Rule 106 hereof. The return of service in such cases shall be endorsed

on or attached to the original notice, and shall be in the form provided in Rule 107, and be signed and sworn to by the party making such service before some officer authorized by the laws of this State to take affidavits, under the hand and official seal of such officer. A defendant served with such notice shall be required to appear and answer in the same manner and time and under the same penalties as if he had been personally served with a citation within this State.

Rule 109. Citation by Publication

Where a party to a suit, his agent or attorney, shall make oath that the residence of any party defendant is unknown to affiant (and to such party where the affidavit is made by his agent or attorney) or that such defendant is a transient person, and that after due diligence such party and the affiant have been unable to locate the whereabouts of such defendant, or that such defendant is absent from or is a nonresident of the State, and that the party applying for the citation has attempted to obtain personal service of nonresident notice as provided for in Rule 108, but has been unable to do so, the clerk shall issue citation for such defendant for service by publication. In such cases it shall be the duty of the court trying the case to inquire into the sufficiency of the diligence exercised in attempting to ascertain the residence or whereabouts of the defendant or to obtain service of nonresident notice, as the case may be, before granting any judgment on such service. Provided, however, that where the affidavit shows that the defendant is not within the United States, and is not in the Armed Forces of the United States, it shall not be necessary for the party to show that the residence or whereabouts of the defendant is unknown or that an attempt has been made to procure service of nonresident notice.